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90-1324

No. .....

Supreme Court, U.S.
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IN THE .....

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NEVADA,

Petitioner,

v.

CY JAMISON, Director of the Bureau of Land Management, Department of Interior; BILLY R. TEMPLETON, Nevada State Director, Bureau of Land Management, Department of Interior,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the State of Nevada have standing in the federal courts to challenge the approval by the Bureau of Land Management of a 51,632 acre right-of-way reservation of public lands allowing the Department of Energy to occupy the public lands for purposes of a program of site characterization of the Yucca Mountain site in southern Nevada for a high-level radioactive waste repository?

II. Did the Ninth Circuit Court of Appeals so far depart from the accepted and usual judicial constructs underlying Article III federal court jurisdiction by failing to observe the liberal notice pleading standards of the Federal Rules of Civil Procedure, by failing to recognize Nevada's material allegations of injury, by applying prudential limitations to Nevada's standing

inconsistent with federal law which has reduced the standing inquiry to the Article III minima, and by deciding the standing issue in a way that conflicts with applicable standing decisions of this Court as to call for an exercise of this Court's power of supervision?

PARTIES

The Petitioner before this Court is the State of Nevada. The Respondents are Cy Jamison, Director of the Bureau of Land Management, Department of the Interior, and Billy R. Templeton, Nevada State Director of the Bureau of Land Management.[1]

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[1]Pursuant to Fed R. App. P. 43(c)(1) and Rule 35.3 of this Court, the following substitutions are noted: Cy Jamison is substituted for Robert F. Burford, Director of the Bureau of Land Management, United States Department of Interior and Billy R. Templeton is substituted for Edward F. Spang, Nevada State Director, Bureau of Land Management.

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IN THE
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OCTOBER TERM, 1990

STATE OF NEVADA,
Petitioner,

v.

CY JAMISON, Director of the Bureau of Land Management, Department of Interior; et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, the State of Nevada, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on November 14, 1990.

OPINIONS BELOW

OPINIONS OF THE COURTS BELOW

The Opinion of the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed is reproduced at pp. 1 to 10 of the Appendix. It is officially

reported at 918 F.2d 854 (9th Cir. 1990). The Ninth Circuit Court of Appeals had jurisdiction of the matters in controversy pursuant to 42 U.S.C. § 1291.

The Bureau of Land Management issued an opinion on January 6, 1988, granting the Department of Energy an extensive right-of-way reservation and dismissed Nevada's objections in BLM document N-47748 reproduced in the Appendix at pp. 54 to 57. The United States District Court for the District of Nevada entered judgment and its Order Dismissing the State's Complaint on January 30, 1989. On March 9, 1989, the Court entered a Corrected Order which was reported at 708 F. Supp. 289 (D. Nev. 1989). The Court's Corrected Order is reproduced in the Appendix at pp. 11 to 54.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on November

14, 1990. There was no petition for rehearing.

This Court's jurisdiction to review the Ninth Circuit Court of Appeals judgment and opinion is conferred by Article III of the Constitution and 28 U.S.C. § 2106.

CONSTITUTIONAL PROVISIONS, APPLICABLE STATUTES AND REGULATIONS

The clauses and provisions of the Constitution are cited below and set forth verbatim at pp. 81 to 82 of the Appendix.

Federal Enclave Clause, Art. I, § 8, cl. 17; Property Clause, Art. IV, § 3, cl. 2.

The following provision of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, is involved in this petition:

Section 102(2)(C), 42 U.S.C. § 4332(2)(C). It is reproduced in the Appendix at pp. 82 to 85.

The provisions of the Nuclear Waste Policy Act, as Amended, 42 U.S.C. §§ 10101 *et seq.*, involved in this case are as follows:

Section 111, 42 U.S.C. § 10131

Section 113, 42 U.S.C. § 10133

Section 114, 42 U.S.C. § 10134

Section 115, 42 U.S.C. § 10135

Section 116, 42 U.S.C. § 10136

Section 119, 42 U.S.C. § 10139

Section 160, 42 U.S.C. § 10172

Section 407, 42 U.S.C. § 10247

They are reproduced in the Appendix, pp. 86 to 151.

The following provisions of the Federal Land Policy And Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*, are involved in this case.

Section 204, 43 U.S.C. § 1714

Section 507, 43 U.S.C. § 1767

They are reproduced in the Appendix at pp. 151 to 161.

The following federal regulations are involved in this case:

10 C.F.R. § 60.2

10 C.F.R. § 60.121

They are reproduced in the Appendix, pp. 161 to 163.

The following Nevada Statutes and Legislative resolutions are involved in this case:

NRS 328.065

NRS 328.500(2)

NRS 459.910

Assembly Joint Resolution 4 (1989)

Assembly Joint Resolution 6 (1989)

They are reproduced in the Appendix, pp. 163 to 172.

STATEMENT OF THE CASE

In 1982, the Congress enacted the Nuclear Waste Policy Act (NWPA), Pub. L. No. 97-425, 96 Stat. 2211 (1983) (now codified, as amended, at 42 U.S.C.

§§ 10101-10270) (1982 and Supp. V 1987)[2]. The NWPA, as originally enacted, provided a comprehensive legislative scheme for a national search for potentially acceptable repository sites (42 U.S.C. § 10136(a) (1982)) from which five would be nominated as suitable by the Secretary of Energy for site characterization to determine their suitability for geologic high-level radioactive waste repositories. 42 U.S.C. § 10132(b)(1)(A) (1982). From these five sites, the Secretary of Energy was to recommend three to the President for the actual process of characterization as candidate sites. 42 U.S.C. § 10132(b)(1)(B) (1982). After three sites had been found preliminarily suitable for a repository based upon site characterization results (42 U.S.C. § 10134(f) (1982), the Secretary was required to recommend one of them to the

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[2]Unless otherwise indicated, citation will be to Supp. V 1987.

President for development as a national high-level radioactive waste repository. 42 U.S.C. § 10134(a)(1) (1982). The President was then authorized to transmit a recommendation of the site to Congress if he considered the site qualified for an application for a construction authorization for a repository. 42 U.S.C. § 10134(a)(2)(A).

On May 27, 1986, the Secretary nominated five sites for characterization as candidate sites (51 Fed. Reg. 19733-84, June 2, 1986) and recommended three sites for site characterization, one each in Texas (Deaf Smith County), Washington (Hanford Reservation) and Nevada (Yucca Mountain). The President approved the Secretary's recommendation.

On December 22, 1987, the Congress amended the NWPA by bundling certain provisions entitled "Title V - Energy and Environment Programs, Subtitle A - Nuclear

Waste Amendments" Pub. L. No. 100-203, 101 Stat. 1330-227 (1987) (the 1987 NWPA amendments) with the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-202, 101 Stat. 1329 (1987) and Pub. L. No. 100-203, 101 Stat. 1330 (1987). The 1987 NWPA amendments designated Yucca Mountain as the sole site to be characterized for development as a repository site. 42 U.S.C. § 10172. Nevada's selection was made in the Conference Committee which considered the Senate version of the budget bill.

Nevada was also selected by the 1987 amendments as an alternate to a site which may be selected through a process of voluntary negotiation with a willing state or Indian tribe. 42 U.S.C. § 10247(c)(2)(B).

On November 24, 1987, the DOE filed an Application For Transportation And Utility Systems And Facilities On Federal

Lands, Standard Form 299, with the Bureau of Land Management. The State of Nevada, through the representation of its Attorney General, vigorously opposed the granting of a right-of-way on the grounds that a right-of-way was deficient in a variety of important respects as an instrument to authorize access for DOE's characterization of Yucca Mountain. The BLM officials were advised that the State had brought a judicial review action before the Ninth Circuit Court of Appeals (Case No. 86-7308) to compel the DOE to seek a congressional withdrawal and reservation of the site with a contemporaneous creation of a federal enclave by either a consent of the Nevada Legislature under Article I, Section 8, clause 17, or a suitable cession of jurisdiction before site characterization could proceed (decided as *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990)

cert. pending, Docket No. 90-992). The State renewed its enclave argument before the BLM, and raised statutory and regulatory compliance issues. On January 6, 1988, Respondent Spang granted the DOE's application and dismissed the State's objections. App. pp. 54 to 57. Respondent Spang's approval (contained in N-47748) purportedly created a reservation called a right-of-way reservation (ROWR) over approximately 51,632 acres of public lands.

On February 5, 1988, the State of Nevada and its Nuclear Waste Project Office, represented by the Nevada Attorney General, timely filed a Notice of Appeal of Defendant Spang's decision with Spang's office, thereby initiating an appeal before the Department of Interior Board of Land Appeals. On March 2, 1988, the Board extended the State's time to file a statement of reasons in support of the

appeal.

On March 25, 1988, the State commenced an action in the United States District Court for the District of Nevada to challenge the approval of the ROWR on a variety of statutory and constitutional grounds. On or about April 1, 1988, the State filed a motion with the Interior Board of Land Appeals to stay its proceedings pending the outcome in District Court. The State's motion was granted on August 2, 1988.

On January 30, 1989, the District Court entered an Order Dismissing the State's Complaint upon jurisdictional standing grounds. App. pp. 11 to 54. On March 9, 1989, the Court entered a Corrected Order which is reported at 708 F. Supp. 289 (D. Nev. 1989). The State appealed to the Ninth Circuit Court of Appeals on February 23, 1989. The case number on appeal was Case No. 89-15272.

On April 6, 1989, the Nevada Legislature enacted two resolutions, AJR 4 and AJR 6, which were approved by the Governor on April 17, 1989. App. pp. 167 to 172. Assembly Joint Resolution 4, expressed the Nevada Legislature's "adamant opposition to the placement of a high-level radioactive waste repository in the State of Nevada." Assembly Joint Resolution 6 prohibited the Federal Government from establishing a repository at Yucca Mountain, Nevada, without the prior consent of the Nevada Legislature or a cession of jurisdiction pursuant to Chapter 328 of the Nevada Revised Statutes, which consent and cession were refused. On April 19, 1989, both AJR 4 and AJR 6 were transmitted to the President, the United States Senate and the House of Representatives. Congress took no action in response to the transmittal.

On June 28, 1989, the Nevada Legislature enacted Assembly Bill 222 which was signed into law by the Governor of the State of Nevada on July 6, 1989. The law was codified in Nevada Revised Statutes (NRS) at Section 459.910. It states:

> 1. It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.
> 2. As used in this section, unless the context otherwise requires, "high-level radioactive waste" has the meaning ascribed to that term in 10 C.F.R. § 60.2.

App. p. 167.

On September 18, 1989, the Nevada Governor, Bob Miller, requested an opinion from the Nevada Attorney General concerning the status of the repository program and the implications for various environmental permit applications filed by the DOE based upon his belief and his intention that AJR 4 and AJR 6 constituted a valid and effective notice of disapproval pursuant to Section 116(b),

42 U.S.C. § 10136(b) of the NWPA. The Attorney General, in a letter opinion dated November 1, 1989, agreed that the Governor correctly characterized AJR 4 and AJR 6 as a notice of disapproval authorized by Section 116(b) of the NWPA, 42 U.S.C. § 10136(b). He further stated his opinion that the Yucca Mountain site had been disapproved by inaction from Congress.

On January 5, 1990, Nevada filed Case No. 90-70004 in the Ninth Circuit Court of Appeals, a petition for review of the Secretary of Energy's refusal to recognize Nevada's notice of disapproval as a veto of the site or as a disqualifying condition and his failure to terminate site characterization activities.

On February 2, 1990, a motion's panel of the Ninth Circuit Court of Appeals ordered Case No. 90-70004 consolidated with Case No. 86-7308. *See* discussion at

p. 9-10, *supra*. The panel also ordered, on April 9, 1990, that Case No. 89-15272 and the consolidated cases would be heard and decided by the same panel of Ninth Circuit Court of Appeals justices.

On September 19, 1990, the Ninth Circuit Court of Appeals panel decided the two consolidated cases in *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990). In *Nevada v. Watkins*, the State challenged, *inter alia*, the presence of a textual basis in the Constitution which would permit the Department of Energy to develop a high-level radioactive waste repository in an unconsenting state such as Nevada where Nevada law prohibits the storage of high-level radioactive waste in the State. The panel identified the Property Clause as the textual basis for the DOE's program. On December 18, 1990, the State of Nevada and individual petitioners filed a petition for a writ of

certiorari in this Court. The case was docketed as Case No. 90-992. The petition has been calendared for the Court's action on the petition on February 15, 1991.

On November 14, 1990, the same panel of the Ninth Circuit Court of Appeals decided Case No. 89-15272. The panel of the Ninth Circuit Court of Appeals decided that Nevada had not established standing to object to the approval by the Bureau of Land Management (BLM) of the 51,632 acre right-of-way reservation allowing the Department of Energy to occupy Yucca Mountain for purposes of excavating, boring and otherwise disrupting the surface and subsurface of the mountain in the process of studying the mountain for its suitability as a high-level radioactive waste repository. The State of Nevada now seeks review by this Court through its petition for a writ of certiorari. The petition for a writ of

certiorari in this case and the petition in Docket No. 90-992 should be considered together as companion cases. The Petitioners in Docket No. 90-992 have filed a motion to defer consideration in that case so that the two cases may be considered together.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeal's panel made two startling decisions in *Nevada v. Watkins, supra*, and this case. In *Nevada v. Watkins*, the Court held that the Property Clause, in and of itself, may serve as the textual basis for the exercise of power by Congress to take title to privately produced, dangerous substances and to dispose of them in a federal facility on the public lands in an unconsenting state whose laws forbid the disposal of such substances within its borders. In this case, the panel held that the state which is targeted for the

waste disposal facility has no standing to complain of the alleged unlawful agency action which authorized the access and occupancy of public lands identified for the development of the facility. These cases, when taken together, portend ominous and potentially devastating consequences for the public land states. This is especially so when it is considered that the Ninth Circuit Court of Appeals exercises jurisdiction over the greatest proportion of the public lands. This Court should grant review of the issues of these cases now. The important issues raised by these cases are unencumbered by complex factual considerations and their resolution will not benefit from further "percolation" in the lower federal courts.

A. This Court's Power Of Supervision Is Called For To Correct The Ninth Circuit Court Of Appeals Abdication Of Its Duty To Exercise Its Jurisdiction

The Ninth Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings by its affirmance of the decision of the United States District Court for the District of Nevada, as to call for an exercise of this Court's power of supervision.

In numerous decisions of this Court, the rule that a federal court must take and exercise the jurisdiction it has is well established. This Court stated in the case of *Wilcox v. Consolidated Coal Co.*, 212 U.S. 19, 40 (1909) that "[w]hen a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens v. Virginia*, 6 Wheat 264, 404) and in taking that jurisdiction the Court cannot be truthfully spoken of as precipitate in its conduct." In the passage from *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821) this Court

stated that the federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), this Court observed that there is a "virtually unflagging obligation of the federal courts to exercise jurisdiction given them." *See also New Orleans Public Service, Inc. v. Council of New Orleans*, ____ U.S. ____, 109 S.Ct. 2506, 2513 (1989) (quoting *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893)); *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988).

The Ninth Circuit Court of Appeals abdicated its duty to accept jurisdiction in at least four ways: First, the Court deviated from the notice pleading standards of the Federal Rules of Civil

Procedure and imposed a rigid fact pleading requirement. Second, it failed to recognize certain of Nevada's well plead material allegations which established actual and threatened injury or mischaracterized others as "mere speculation", (App. p. 8). Third, it applied prudential limitations to the question of Nevada's standing in the face of Congress' policy in the NWPA and the Administrative Procedures Act, 5 U.S.C. § 702, which reduces the standing requirements relative to Nevada's challenges to federal agency action in connection with the federal program to site a high-level radioactive waste repository to the Article III minima. Fourth, the Court decided the standing issue in a way that conflicts with applicable standing decisions of this Court.

1. Nevada Provided A Short And Plain Statement Alleging Injury

At oral argument, Justice Wallace, who authored the Ninth Circuit Court's opinion, asked the crucial question to Nevada's counsel: What is the injury? Nevada's counsel answered by citing to Paragraph 3.2 of Nevada's Complaint which states:

> The Defendants have conspired with the Department of Energy Officials to create a fait accompli in which the State of Nevada's political right to object to its selection as the host for a repository for the nation's spent nuclear fuel rods is rendered meaningless. The object of their conspiracy is to render Nevada, a politically weak State, defenseless to the interests of the other 49 states in solving a purely commercial problem at the expense of Nevada which has played no part in creating the problem.

The response satisfied two requirements for standing: One, under the rules of notice pleading Nevada alleged an actual injury fairly traceable to the challenged conduct and, two, the allegation was

contained in the Complaint.[3] Nevada's oral argument and briefs before the Ninth Circuit Court stressed the implications of Paragraph 3.2.

Nevada contended that the infringement of its "political right to object" in Paragraph 3.2 of its Complaint, was referable, in part, to the circumvention of the substantive and procedural provisions of FLPMA and NEPA which give Nevada rights of participation in an important public land decision which provides DOE with access to Yucca Mountain for development of a repository. Nevada also contended that the injury to its political right to object was referable to the right of Nevada to submit a notice of disapproval under Section 116(b) of the

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[3]The State's counsel pointed out that in the lengthy District Court opinion no mention was made of Paragraph 3.2 of the Complaint. The District Court accepted the BLM's assertions, in toto, as to Nevada's standing (708 F. Supp. at 292, App. p. 15) but, as Nevada's counsel pointed out, no mention was made in BLM's extensive briefs (112 pages) of Paragraph 3.2.

NWPA.

Nevada asserted direct economic injury in relation to the "at the expense of" language of Paragraph 3.2 by pointing out that the negative imagery and perceptions of risk as amplified by the media, tends to dissuade tourists and the recreating public from visiting an area that is identified with the storage of highly radioactive and dangerous waste byproducts. Nevada further asserted that the recreating public does not make its decisions and choices based on the fine distinctions associated with a label such as site characterization.

Nevada presented credible documentary evidence to the Court in an Appendix to its briefs in support of its economic and environmental endangerment assertions. The State also provided such evidence upon which a reasonable trier of fact could conclude that the BLM officials had

conspired with the DOE.

The harm which Nevada asserted did not go without notice in either of the lower Courts. The District Court noted at 708 F. Supp. 296, n.8 (App. p. 32):

> Cited as 'specific examples of direct injury to Nevada's sovereign and quasi-sovereign interests', Nevada discusses the polarization of the population and infrastructure, and the potentially negative influence a repository would have on the state's image as a tourist destination (#19 at 26-27).

The Ninth Circuit Court of Appeals, in similar recognition, correctly observed that:

> In this case, Nevada alleges that the selection of Yucca Mountain as the site for a national repository will have a devastating effect on the state's vital tourist industry.

App. p. 9.

Nevada did not limit its allegation of harm to a time when the repository is formally selected. As evidence of continuing injury, the State cited a report of nationally known experts which

had peer-reviewed Nevada's socioeconomic impact studies. The Technical Review Committee concluded:

> From the evidence now available, it appears that the designation of Yucca Mountain as the site for a repository has already had significant socioeconomic impacts on Nevada, and that, depending upon numerous decisions not yet made by federal, state, and local agencies as well as public reactions to future events, the development of the repository could have a profound effect upon the economy and quality of life of people of the region. This conclusion arises in part from observation of the effects on the political and social fabric of Nevada over the fourteen years since investigations commenced at Yucca Mountain, and in part from emerging findings related to public perceptions of the risks of waste transportation, storage, and disposal.

Nevada also contended that the stigma associated with the development of what has been commonly characterized by the media as a "nuclear dump" is, itself, an injury which satisfies standing.

Nevada traced the alleged injuries to the putative illegal conduct of the

Respondents. Without access authorization to Yucca Mountain, the DOE would be unable to conduct site characterization. Without site characterization, the selection of Yucca Mountain as the federal high-level radioactive waste repository cannot be realized. The actual and threatened injury, therefore, is directly linked to BLM's decision to approve DOE's access through the ROWR for site characterization.

While Nevada may not frustrate lawful federal agency decisions, it has a judicially cognizable standing to prevent unlawful decisions that result in injury to its legitimate interests. *See* Complaint, Paragraph 1.12, App. pp. 67 to 69. The BLM officials authorized access for site characterization through what Nevada contends is an unlawful instrument identified by BLM as a right-of-way reservation.

Nevada sought declaratory relief and a court order setting aside the ROWR and injunctive relief requiring the BLM to comply with applicable law. The relief requested was within the power of the Court and capable of being fashioned in an appropriate order.

2. The Lower Court Mischaracterized And Failed To Recognize Nevada's Material Allegation Of Injury

As indicated by the foregoing section, Nevada supplied in its Complaint, "a short and plain statement of the claim" under Rule 8(a) of the Federal Rules of Civil Procedure which satisfied the liberal notice pleading concepts announced by this Court fifteen years after Rule 8(a) had abolished fact pleading. In *Conley v. Gibson*, 355 U.S. 41, 47 (1957) this Court stated:

> [T]hat the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain

> statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

See also United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688-89 (1973); *compare Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-78 (1982).

The Ninth Circuit Court, although having recognized Nevada's allegation of economic injury associated with site characterization, refused to accept such allegations as satisfying the Article III standing requirement. The Ninth Circuit Court of Appeals mischaracterized the gravamen of Nevada's well plead short and plain statement of its claim that "its political right to object to its selection as the host for a nuclear waste repository has been rendered meaningless by the Bureau's action" by suggesting that "the decision of whether to construct the repository at Yucca Mountain is many years

and numerous procedural hurdles away." App. p. 8. The Court further stated that "Any claim by Nevada that site characterization will inevitably lead to the designation of Yucca Mountain as a repository is mere speculation . . . ." App. p. 8.

In the recent case of *Lujan v. National Wildlife Federation*, ____ U.S. ____, 110 S.Ct. 3177, 3189 (1990) this Court stated the rule that a Rule 12(b) motion "presumes that general allegations embrace those specific facts that are necessary to support the claim." The Ninth Circuit Court, while giving lip service to the rule when it stated: "we must construe the complaint in favor of Nevada, and accept as true all of Nevada's material allegations," (App. p. 6), nevertheless inappropriately ignored or dismissed those allegations as "mere speculation." The Ninth Circuit Court

deviated from this Court's construction in *Lujan* of the well-established rule.

In support of its general allegation, Nevada had argued in its reply briefs in both of the companion cases that the process of site characterization would subject Nevada's Yucca Mountain site to consideration as an alternate site in an Environmental Impact Statement (EIS) prepared by the Nuclear Regulatory Commission for a site within a state which has negotiated to volunteer such site for a repository. *See* 42 U.S.C. 10247(c)(2)(B).[4] Nevada argued that if

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[4]In *Nevada v. Watkins, supra,* 914 F.2d at 1559-60, the Ninth Circuit Court refused to address this argument. In support of that refusal the Court stated:

> In its reply brief, Nevada raises for the first time the argument that 42 U.S.C. § 10247(c)(2)(B) constitutes a selection of Yucca Mountain as the repository site. Petitioners' Reply Brief at 2, 33. Section 10247(c)(2)(B) was enacted by Congress as part of the Omnibus Budget Reconciliation Act of 1987. As a result, Nevada had the opportunity to raise this issue in its opening brief. Consideration of this argument would be unfair to the Secretary, who has not had the advantage of briefing the issue. In declining to consider this argument, we follow "'[t]he general rule . . . that appellants cannot raise a new

site characterization goes forward, Nevada will have been selected for discriminatory treatment in relation to the negotiated site. This is not "mere speculation" as the lower court characterized it, but rather, the clear effect of federal law.

Injury to Nevada's political right to issue a notice of disapproval under Section 116(b), 42 U.S.C. 10136(b), should site characterization go forward, is established, as indicated, by the Yucca Mountain site's identification as the

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issue for the first time in their reply briefs.'" *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986) (quoting *Thompson v. Commissioner*, 631 F.2d 642, 649 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981)).

The State advanced the same argument in the reply brief in this case. The BLM's counsel responded to it at oral argument. The Court ignored it. It should be noted that if the State had advanced the argument in its opening briefs it would have been criticized on ripeness grounds or as speculation because a Nuclear Waste Negotiator, who is charged with the responsibility to find a volunteer site, had not been nominated at that time. The State pointed out in its reply brief that "On June 4, 1990, the President nominated David H. Leroy, a former Lieutenant Governor of Idaho, to be the HLW Negotiator." He was subsequently confirmed by the Senate. Nevada filed its opening brief on May 16, 1990.

alternate in the NRC's EIS. The Secretary of Energy is required to prepare an Environmental Impact Statement for the "negotiated site" to accompany the application to the NRC for a repository construction authorization. Section 407(b), 42 U.S.C. 10247(b). The NRC "*shall consider the Yucca Mountain site as an alternate to such site*" in the EIS it must prepare to accompany the grant of a repository construction authorization for a negotiated site. (Emphasis added). Section 407(c)(2)(B), 42 U.S.C. 10247(c)(2)(B). The characterization of the Yucca Mountain site shall be compared with the characterization of the "negotiated site" in the NRC's EIS. Thus, a site from a volunteer State will be compared to a site from a conscripted State, Nevada, and Nevada's site may emerge as the preferred alternative. Nevada, therefore, will be injured by

discriminatory treatment in being deprived of the opportunity to issue a notice of disapproval which the volunteer State has voluntarily waived.

Even if a negotiated site does not materialize, if Yucca Mountain is characterized and found suitable, a high degree of jeopardy attaches to Nevada's final selection as a repository. There is no way of determining whether the Yucca Mountain site could satisfy the NRC's licensing requirements in 10 C.F.R. Part 60 without site characterization. Site characterization is the process, once it is completed, by which the Secretary of Energy can represent that a site is suitable for development as a repository. Based upon the process by which Nevada was selected for characterization by the Congress, once site characterization has been completed, the selection of the Yucca Mountain site by the President and

Congress is a highly probable conclusion.[5] In fact, Nevada contends that there has been a *de facto* selection already.

The fate of the Yucca Mountain site, if site characterization goes forward, will depend on decisions which are completely out of the State's control.

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[5]If the Congress is willing to mistreat Nevada at the beginning of the repository siting process, there is no reason to believe that it will refrain from doing so at the end of the process. The Ninth Circuit Court dismissed Nevada's complaint of discriminatory treatment by Congress in *Nevada v. Watkins*, 914 F.2d at 1556:

> Nevada cannot point to any defect in the political process that led to the enactment of the 1987 NWPA amendments. As the Secretary points out, the Tenth Amendment does not protect a State from being out-voted in Congress. Nevada's relative lack of political strength is a result of the "Great Compromise" of the 1787 Constitutional Convention, in which each State was guaranteed equal representation in the Senate and proportionate representation in the House of Representatives.

The threatened and predictable action of Congress, for which Nevada has no remedy, at least according to the Ninth Circuit Court, raises Nevada's allegation above the level of "mere speculation." The expenditure of billions of dollars to accomplish site characterization was alleged by Nevada in Paragraph 1.14 and 1.17 of its Complaint (App. pp. 70 to 71 and 73-74) as a factual averment to support the State's allegation of a "fait accompli." The Ninth Circuit Court ignored the averment.

The threatened loss of its statutory notice of disapproval rights is a "distinct and palpable injury" which confers standing. The Ninth Circuit Court of Appeals refused to recognize it as such.

B. The Ninth Circuit Court Of Appeals Erred By Applying Prudential Limitations To The Question Of Nevada's Standing

1. The Lower Court Failed To Recognize That Nevada's Oversight And Monitoring Role Under The NWPA Reduced Its Proof Of Standing To The Article III Minima

The Ninth Circuit Court of Appeals stated that "Clearly the right-of-way decision has not stripped Nevada of its right to participate in the site characterization process . . . ." App. p. 8. On the other hand, the Court candidly recognized that "Nevada contends that the Bureau violated requirements of the Land Act [FLPMA] by issuing the right of way . . . " (App. p. 6) and "Nevada

further argues that the environmental assessment accepted by the Bureau in connection with the right-of-way grant is insufficient to satisfy the requirements imposed by the Environmental Act." App. p. 7. It is difficult to perceive how Nevada can participate in the site characterization program if Nevada is denied standing to require the BLM, when acting in concert with its sister agency, the DOE, to follow the law in making decisions which concern site characterization. Nevertheless, standing was denied by the Court despite Nevada's allegation in Paragraph 1.5 of its Complaint that Nevada has oversight and monitoring responsibility under the NWPA which extends to agency action by the BLM insofar as it affects site characterization.[6] The Ninth Circuit

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[6]The complete allegation in Paragraph 1.5 of the Complaint is:

1.5 The Plaintiff State of Nevada, has oversight and monitoring responsibility

misapplied this Court's statement from *Allen v. Wright*, 468 U.S. 737 (1984) in relation to Nevada's role under the NWPA:

> [A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. *Allen*, 468 U.S. at 754; . . .

The Ninth Circuit Court's failure to question Nevada's standing in the companion case, *Nevada v. Watkins*, 914 F.2d 1545 (1990), which involved Nevada's challenge to DOE's failure to follow the law, belied its reliance on the statement in *Allen*. A number of issues in *Watkins* were identical to those raised in this case. For instance, in Case No. 86-7308 (one of the consolidated cases in *Nevada v. Watkins, see discussion, supra,* at pp. 9-10), Nevada sued the Secretary of Energy

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> for the Department of Energy's program to characterize the site and, if subsequently selected, for the construction of a high-level nuclear waste repository at Yucca Mountain, Nevada. The State's oversight role extends to agency action by the BLM insofar as it affects site characterization.

App. p. 63.

for his failure to acquire a congressional withdrawal and reservation of land on and around Yucca Mountain with a contemporaneous cession of jurisdiction from the Nevada Legislature before commencing site characterization in the absence of some determination by the Nuclear Regulatory Commission that a lesser jurisdiction and control was permissible under its regulation in 10 C.F.R. 60.121. The same issue was raised in this case against Robert F. Burford as Director of the BLM. *See* Complaint, Paragraphs 1.8 and 1.11, App. pp. 64 to 67.

The Ninth Circuit Court failed to address Nevada's arguments regarding the implications of Congress' policy recognizing Nevada's oversight role under the NWPA. Had it done so it would have recognized that Nevada has standing not only to challenge actions of the DOE but

also those of the BLM when decisions are made which affect the repository siting program. The Ninth Circuit Court inferentially recognized the inconsistency of its decision regarding Nevada's standing to challenge DOE but not the BLM when it recognized, with respect to the NWPA, that:

> In order to aid the Department in its site characterization activities, the Waste Act provides,
>
> > [t]o the extent that the taking of any action related to the site characterization of a site . . . requires a certificate, *right-of-way*, permit, lease, or other authorization from a Federal agency or officer, such agency or officer shall issue or grant any such authorization at the earliest practicable date, to the extent permitted by the applicable provisions of law administered by such agency or officer.
>
> 42 U.S.C. § 10140(a)(1) (emphasis added). Pursuant to this section, the Department applied to the Bureau in November 1987 for a right-of-way over public land near Yucca Mountain.

App. p. 2. Section 119(a)(1)(C) of the

NWPA, 42 U.S.C. 10139(a)(1)(C), provides that the Ninth Circuit Court of Appeals has "jurisdiction over any civil action . . . challenging the constitutionality of any decision made, or action taken, under any provision of this subtitle." The provision cited by the Ninth Circuit Court, Section 120(a)(1), 42 U.S.C. § 10140(a)(1), and the section which it follows, Section 119, are both parts of Subtitle A of the NWPA. As Nevada's Complaint challenged the constitutionality of the BLM's decision to approve the right-of-way, it was within Section 120(a)(1) and subject to the Ninth Circuit Court's jurisdiction.[7] *See, e.g., General*

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[7]The District Court recognized the Ninth Circuit's jurisdiction in *Nevada v. Burford* at 708 F. Supp. at 301, n.14, App. p. 53:

> Moreover, Nevada's challenge under the Tenth Amendment is directed solely at the NWPA Amendments of 1987, which designate Yucca Mountain as the sole study site. Consequently, this Court is without jurisdiction since Congress vested original and exclusive jurisdiction over such matters arising under the NWPA with the courts of appeal. 42 U.S.C. § 10139(a)(1)(C) (1982).

Electric Uranium v. U.S. Department of Energy, 764 F.2d 896, 901-02 (D.C. Cir. 1985); *State of Tenn. v. Herrington*, 806 F.2d 642, 650 (6th Cir. 1986).

Congress, therefore, had reduced the standing requirement as to a judicial review action challenging the decisions of the BLM, when made under Section 120(a) of Subtitle A of NWPA, to its Article III minima by the enactment of Section 119 just as with judicial review actions against the DOE. The Ninth Circuit Court failed to address Nevada's arguments on this point.

This Court has recognized that "[t]he actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975). *See also, Havens Realty Corp. v. Coleman*, *supra*, at 373. In *Warth v. Seldin*, at 500

this Court stated that "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Nevada, by its direct selection in the 1987 Amendments to the NWPA, was given a private cause of action to challenge the unlawfulness of federal agency action. In order to establish public confidence that the repository program was being conducted in a manner that would protect the public and the environment, this was a concession that Congress found necessary. *See* Section 111(a)(6), 42 U.S.C. § 10131(a)(6).

In *Nevada v. Herrington*, 827 F.2d 1394, 1400 (9th Cir. 1987), the Ninth Circuit Court of Appeals recognized that:

> Congress provided for judicial review in section 10139 of the Act [NWPA] and the states are free to challenge DOE's action pursuant to

this provision.

If, as the Ninth Circuit Court held, Nevada is free to challenge DOE's actions, the State should have standing to challenge the BLM's actions when it is acting in concert with the DOE.

At least some of the errors of the Ninth Circuit Court of Appeals may be traced to its failure to appreciate the fact that because Congress did in fact reduce Nevada's proof of standing to the Article III minima, the prudential limitations applied by the Court were applied in error. Nevada argued in its briefs and at oral argument that it was error for the District Court to utilize prudential limitations to reject Nevada's standing; the Ninth Circuit Court has rejected Nevada's arguments and endorsed the errors of the District Court.

2. The Lower Court Failed To Recognize That Nevada's Proof Of Standing Is Reduced To The Article III Minima By The APA And That Nevada Is In The Zone Of Interest Of The Relevant Statutes

The precedents of this Court recognize that where, as here, a state sues under the Administrative Procedures Act, 5 U.S.C. § 702 et seq., the Congress has enlarged standing to the full extent of the Article III minima, and prudential limitations are not applicable. *See, e.g., Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Both of the lower Courts erred by imposing prudential limitations on the State's standing.

This Court has developed a "zone of interests" test to aid in standing determinations involving the Administrative Procedures Act grant of standing "to a person 'aggrieved by agency action within the meaning of a relevant

statute.' 5 U.S.C. § 702" *See, e.g., Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970).

In this Court's recent case of *Lujan v. National Wildlife Federation, supra*, the "zone of interests test" was discussed in the same context as that complained of in this case. Nevada, like the NWF complained of illegal alterations of land use classifications without compliance with the procedural and substantive requirements of the FLPMA. *See* Paragraph 1.12 of Nevada's Complaint, App. pp. 67 to 69. The similarity of the issues prompted the State to cite the preliminary injunction which enjoined the Director of the BLM from altering land use classifications existing on January 1, 1981 which had been issued by the District Court in *National Wildlife Federation v. Burford* (referred to by this Court, 110 S.Ct. at 3184). *Id.*

This Court stated in *Lujan* that:

> [W]e have said that to be 'adversely affected or aggrieved . . . within the meaning' of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Consistent with this Court's construction of § 10(a) of the APA, 5 U.S.C. § 702, Nevada alleged in its Complaint and has shown that it suffered "legal wrong because of the challenged agency action" and is "'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.'" *Lujan*, 110 S.Ct. at 3186.

It is enough that the plaintiff be "arguably in the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *See, e.g., Data Processing Service Organizations v. Camp, supra,* at 153.

Congress legislated that Nevada is in the "zone of interests" with respect to the NWPA by establishing Nevada's rights of participation. *See, e.g., Nevada v. Herrington*, 777 F.2d 529 (9th Cir. 1985); *Cf. Investment Institute v. Camp*, 401 U.S. 617, 620 (1971). Nevada is in the "zone of interests" to challenge BLM's failure to comply with NEPA, 42 U.S.C. §§ 4321 et seq. *See, e.g., City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975). Nevada is in the "zone of interests" with respect to the FLPMA provisions which provide for withdrawals of lands and related access authorizations for the benefit of other federal agencies. Nevada is obviously in the zone of interests of the constitutional guarantees as *Nevada v. Watkins* attests.

Nevada, therefore, has standing, to insist that the substantive and procedural protection of NEPA, FLPMA and the NWPA are

complied with by the BLM in its approval of land access authorizations which will permit the site characterization program to proceed. The Ninth Circuit Court of Appeals did not address Nevada's "zone of interests" arguments.

C. The Prudential Limitations Were Misapplied By The Lower Court To Deny Nevada's Sovereign And Quasi-Sovereign *Parens Patriae* Standing

The "generalized or abstract grievance" test employed by both the District Court, 708 F. Supp. at 295-297, App. pp. 30 to 38, and the Ninth Circuit Court (App. p. 7) was inappropriate because it encompasses prudential rather than Article III standing criteria. *See Allen v. Wright, supra,* at 751. Nevertheless, the Ninth Circuit Court agreed with the District Court "that Nevada's claims merely 'constitute a generalized grievance that the [Bureau] is not acting in a way in which [Nevada] maintains is in accordance with federal

laws . . . .' This is insufficient to demonstrate standing." App. p. 7. State challenges to public land decisions which are violative of State laws and policy, are not merely "generalized grievances" but implicate serious injuries to State governmental prerogatives and sovereign interests. *See* section D. for examples of those injuries, *infra*, at p. 57.

Nevada's land mass is 87 percent owned by the Federal Government. Of the remaining 13 percent, approximately 6 percent was granted to the railroads as an incentive for railroad construction. *Cf. United States v. Leo Sheep Co.*, 440 U.S. 668 (1979).

The District Court and the Court of Appeals denied Nevada's standing to complain of BLM's decision affecting the classification and use of land on and around Yucca Mountain which Nevada contended was made in violation of federal

law. Both the District Court and the Ninth Circuit Court of Appeals emphasized that: "The federal government, not Nevada, owns the land in question." App. p. 7. Equating Nevada's standing with the usual standing criteria applied to private organizations, both Courts also found significance in the fact that "Nevada did not allege in its complaint that it uses the land surrounding Yucca Mountain for any purpose." App. p. 7, 708 F. Supp. at 295, App. p. 31.

The lower courts applied standards of standing even more stringent than that imposed on private organizations seeking review of changes in public land classifications and changes in use patterns. In one of the most recent standing cases, *Lujan v. National Wildlife Federation, supra*, this Court denied the National Wildlife Federation representational standing to complain of

changes in public land classifications which the NWF contended were illegal, but as to discrete tracts of land that a member or members actually used, the NWF could achieve standing as a representative of its members to challenge land classification decisions affecting the discrete tracts of land.

Nevada is precluded from representing individual citizens because of the nominal party plaintiff rule. *See, e.g., Alfred L. Snapp & Sons Inc., v. Puerto Rico*, 458 U.S. 592, 607 (1982). As to the State's general representation of its citizens, the lower court denied Nevada a similar representational capacity generally accorded private organizations:

> Nevada alleges that it has standing in its *parens patriae* capacity to advance the interests of its citizens . . . . Although the Supreme Court has endorsed *parens patriae* suits in general, it has also stated that [a] State does not have standing as *parens patriae* to bring an action against the Federal Government. *Snapp* [citing *Alfred L.*

> *Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592] at 610 n.16 (stating that with respect to the citizens' rights in relation to the federal government, 'it is the United States, and not the State, which represents them as *parens patriae*').

In order to reach the conclusion that Nevada does not have standing in a representational capacity relative to its citizens, the Ninth Circuit Court of Appeals ruled that its "case of *Washington Utilities & Transportation Commission v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975), must, of course, give way to the Supreme Court's clear statement in *Snapp*." App. p. 9. The statement in *Snapp*, however, is not so clear.

In *Snapp*, four members of this Court, in dicta, announced that "A State does not have standing as *parens patriae* to bring an action against the Federal Government." 458 U.S. at 610, n.16. Three concurring members joined Justice Brennan, however, and stated:

> In cases such as the present one, I can discern no basis either in the Constitution or in policy for denying a State the opportunity to vindicate the federal rights of its citizens. At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations.

The concurring opinion of four members of this Court created an internal conflict with the dicta announced by the four other members in footnote 16 of *Snapp*.

Private organizations have standing to vindicate the federal rights of a member or members against the Federal Government. If Nevada is to be accorded the same representational rights to enforce the rights of its citizens as a private organization, why is its standing to be denied, unlike that of a private organization, when it sues the Federal Government? The answer, it would seem, is that standing in the circumstance where a state sues the Federal Government in the representational capacity known as *parens*

patriae, for the protection of its citizens, is not an Article III limitation on the jurisdiction of the federal courts, but a prudential limitation which must turn on the nature of the case. In this case, such prudential limitations have been abrogated by the policy of Congress in reducing Nevada's standing requirements to their Article III minima. The Ninth Circuit Court did not account for this distinguishing fact.

This Court has not foreclosed absolutely, as the Ninth Circuit Court held, suits in *parens patriae* against the Federal Government. In *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) this Court stated that:

> We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress . . . .

Nevada submits that this is a case in which this Court should grant certiorari

for the purpose of settling the important question of whether a state may bring an action *parens patriae* to protect its citizens against agency execution of unconstitutional acts of Congress in the judicial review circumstances of this case.

In this case, unlike the case in *Mellon* where general laws applicable to the national citizenry were involved, the BLM is attempting to execute a law of Congress which identified the State of Nevada and its citizens for invidiously discriminatory treatment. The presumption underlying this Court's dicta that the Federal Government, not the states, stands in *parens patriae* to the population of a state fails when the Federal Government singles out that state and its citizens for economically damaging treatment. The prudential presumption that the United States rather than the state is in the

relationship of *parens patriae* to the citizens of Nevada is inapposite in this circumstance.

D. The Lower Court Failed To Recognize That Nevada Has Standing To Complain Of Injuries To Its Sovereign Interests

Nevada alleged in paragraph 1.3 of the Complaint that it brought the action "in its sovereign capacity, its proprietary capacity and as *parens patriae* of its citizens." App. p. 62. Contrary to the Ninth Circuit Court's analysis, any and all of these bases establish standing.

The Nevada Legislature has enacted in NRS 328.065:

> An officer of an agency or instrumentality of the United States:
>
> * * *
>
> 4. Shall apply to the state land use planning agency pursuant to the procedure set forth in NRS 321.736 to 321.739, inclusive, for consent to use land held solely for proprietary purposes relating to the retention and management of the public lands, if that use interferes with the sovereignty of this state respecting the land within its borders.

No effort has been made by either the BLM or the DOE to comply with this statute. The Ninth Circuit Court of Appeals determined in *Nevada v. Watkins, supra*, that the Federal Government was acting pursuant to its Property Clause powers in developing the lands at Yucca Mountain for a federal high-level radioactive waste repository. Thus, the federal agencies are acting in the Federal Government's proprietary capacity.[8] The Nevada Attorney General acting pursuant to NRS 328.500(2) determined that Nevada's sovereignty was impaired by the actions of the BLM officials and responded by bringing an action in the District Court. The State of Nevada, therefore, has identified a basis for standing in the exercise of its sovereign right to enforce its own laws which the Ninth Circuit Court

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[8]The Nevada Legislature has also enacted a law that proscribes the storage of high-level radioactive waste in Nevada as unlawful. *See* NRS 459.910. App. p. 167.

failed to address.

Nevada's sovereignty is impaired in other respects by the BLM's approval of the ROWR. Nevada's sovereign interest in the protection of its vital tourist industry was not addressed. Nevada argued before the Ninth Circuit Court that if site characterization is permitted to go forward on the basis of the ROWR, the specter of thousands of protestors converging on Yucca Mountain to demonstrate their displeasure is a likely event. Their presence would overload available State and county law enforcement resources. The State may be required to provide medical and other social services for the throngs of people that may be attracted from all over the country. Add to this the potential for sabotage directed against either State or federal facilities, given the adverse public sentiment, the burden on State services

could be substantial. Personal injury and property damage, the prevention of which are interests which are within the State's protection, are probable. Irreversible environmental damage is also a probable threat particularly to endangered and protected species such as the desert tortoise and the fish-hook cactus and their habitats. These represent threatened injuries associated with site characterization and particularly site characterization under a public land access authorization such as an ROWR which does not carry with it sufficient federal jurisdiction to relieve the State from having to provide police and other forms of governmental protection. The Ninth Circuit Court ignored these arguments.

E. The Lower Court Mischaracterized Nevada's Standing To Complain Of Injuries To Its Proprietary Interests

Even though the United States owns most of the land on and around Yucca

Mountain, Nevada has proprietary interests in the vicinity of the ROWR. To the extent that property use and value are generally diminished by site characterization, the State's proprietary interests will be adversely affected. The Ninth Circuit Court ignored this argument, too.

The Ninth Circuit Court limited its inquiry as to Nevada's proprietary standing to a consideration of the disturbance of the affected land on and beneath Yucca Mountain. The Court then stated that "Nevada does not own the affected property for any purpose, nor has it alleged that it uses the property for any purpose. Nevada has failed to show that *it* will suffer on account of that disturbance. Proprietary standing is therefore not available to Nevada." App. p. 9. The Court applied a superficially inadequate treatment to Nevada's alleged

proprietary standing.

F. The Lower Court Refused To Recognize Nevada's Standing To Complain Of Constitutional Infringement Of Nevada's Rights As A Member Of The Union Of States

Nevada alleged in Paragraph 3.2 of its Complaint that:

> The acts of Defendants raise constitutional issues of the highest order involving the land-holding function of the United States . . . . Unless the Defendants are permanently restrained and enjoined, Nevada's equal footing and Tenth Amendment rights will be seriously diminished to the detriment of Nevada and the Union of States.

App. p. 76.

In its Fourth Cause of Action Nevada requested declaratory relief and particularly "for a declaration of the constitutionality of the FLPMA, NWPA and NWPAA (the 1987 Amendments to the NWPA) to the extent these statutes are relied upon for the land use authorization." App. pp. 79 to 80.

The Ninth Circuit Court of Appeals did not address Nevada's standing based

upon the alleged infringement of its constitutional rights. The District Court addressed selected constitutional issues even though it did not recognize their alleged violation as a basis for standing. Certain issues, of particular concern to Nevada, were not addressed at all.

Where a state is alleging constitutional infringement of its rights by agency action, the standing issue can be answered confidently without any additional factual allegations or inquiry. *Cf. Larson v. Valente*, 456 U.S. 228, 241 (1982); "[W]hen constitutional questions are in issue, the availability of judicial review is presumed . . . ." *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

Nevada complains of agency action which executes discriminatory treatment and constitutionally impairs Nevada's sovereignty in relation to that enjoyed by other states and in relation to accepted

notions of federalism. *See Coyle v. Oklahoma*, 221 U.S. 559 (1911).

In Paragraph 4.3 of its complaint (App. p. 79), Nevada alleged:

> Plaintiff State of Nevada is entitled to a decree which declares that the action of the Defendants is null and void for the reasons that the *nature and degree of infringement* upon an unconsenting state's sovereignty and equal footing under the circumstances of this case and particularly upon Nevada's sovereignty and equal footing is not authorized by any power exercisable under the Constitution. (Emphasis added).

This is not the document to demonstrate that the "nature and degree of infringement" upon Nevada's sovereignty and equal footing is impermissible in the circumstances of this case. That is a factual issue raising questions of degree which more appropriately should be reserved for a trial on the merits. Nevada's contention, herein, is only that it is entitled to a trial and has standing to pursue its remedy in the federal

courts.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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